INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Specification of errors to be urged	7
Summary of Argument	7
Argument:	
I. Notwithstanding the unconstitutionality of the Agricultural Adjustment Act, appellees may be guilty of conspiracy to violate Section 35 of the Criminal Code, by fraudulently obtaining benefit payments under that Act	9
II. Appellees are estopped to attack the constitutionality of the Agricultural Adjustment Act	25
Connclusion	30
Appendix	31

CITATIONS

Cases:	
American Bond & Mortgage Co. v. *United States*, 52 F. (2d) 318	29
Anniston Mfg. Co. v. *Davis*, 301 U. S. 337	11
Ayers v. *Newark*, 49 N. J. L. 170	30
Booth Fisheries v. *Industrial Comm.*, 271 U. S. 208	26
Buck v. *Kuykendall*, 267 U. S. 307	27
Burton v. *United States*, 196 U. S. 283	11
Cagle v. *United States*, 3 F. (2d) 746	17
Capone v. *United States*, 51 F. (2d) 609	11
City of Topeka v. *Dwyer*, 70 Kan. 244	18
Columbus & Greenville Ry. v. *Miller*, 283 U. S. 96	12
Curtin v. *Barton*, 139 N. Y. 505	18
Daniels v. *Tearney*, 102 U. S. 415	25, 29
Great Falls Mfg. Co. v. *Attorney General*, 124 U. S. 581	26, 28, 29
Hall v. *Johnson*, 41 Mich. 286	24
Harding v. *United States*, 81 F. (2d) 563	16, 17
Hirsh v. *Block*, 267 Fed. 614, 256 U. S. 135	29
Humbird v. *Avery*, 195 U. S. 480	29
Hunt v. *State*, 186 Ind. 644	30
Hurley v. *Commission of Fisheries*, 257 U. S. 223	26
Ingles v. *People*, 90 Colo. 51	29
Jannett v. *Windham*, 109 Fla. 129	29
Kirby v. *State*, 57 N. J. L. 320	19
Kluczek v. *State*, 115 N. J. L. 105	29

Cases—Continued. Page

Langer v. *United States*, 76 F. (2d) 817 ..... 16, 17
Madden v. *United States*, 80 F. (2d) 672 14
Norton v. *Shelby County*, 118 U. S. 425 21
Pierce Oil Co. v. *Phoenix Refining Co.*, 259 U. S. 125 28
St. Louis Co. v. *Prendergast Co.*, 260 U. S. 469 25
Smith v. *Indiana*, 191 U. S. 138 ..... 12, 13
Smith v. *Lynch*, 29 Oh. St. 261 18
Smith v. *Sheeley*, 12 Wall. 358 18
State v. *Board of Police Commissioners*, 56 N. J. L. 258 30
State v. *Collins*, 225 Mo. 633 30
State v. *Gardner*, 54 Oh. St. 24 19
State v. *Stone*, 46 La. Ann. 147 30
Strang, Ex parte, 21 Oh. St. 610 18
United Gas Co. v. *Railroad Comm.*, 278 U. S. 300 ..... 26, 27, 28
United States v. *Bowman*, 260 U. S. 94 11
United States v. *Butler*, 297 U. S. 1 ..... 11, 29
United States v. *Cohn*, 270 U. S. 339 11
United States v. *Harding*, 81 F. (2d) 563 16
United States v. *MacDonald*, 10 F. Supp. 948 ..... 11, 14
United States v. *Realty Co.*, 163 U. S. 427 22
United States v. *Schor*, 13 F. Supp. 399 17
United States v. *Seelig and Mesch Construction and Equipment Corp.* (S. D. N. Y., Dec. 8, 1936) 15
United States v. *Soeder*, 10 F. Supp. 944 ..... 11, 17
Wall v. *Parrot Silver & Copper Co.*, 244 U. S. 407 ..... 26, 28

Statutes:

Agricultural Adjustment Act of May 12, 1933, c. 25, 48 Stat. 31 ..... 3, 4
Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. C., Title 18, Sec. 682) 1
Criminal Code:
Sec. 28 (U. S. C., Title 18, Sec. 72) 14
Sec. 35, 35 Stat. 1095, as amended by the Act of October 23, 1918, ch. 194, 40 Stat. 1015 (U. S. C., Title 18, Sec. 80) 2
Sec. 37 (U. S. C., Title 18, Sec. 88) 2

Miscellaneous:

Bigelow, Fraud (1888) p. 497 24
Bower, Spencer, Actionable Misrepresentation (1911) Sec. 128 25
Field, The Effect of an Unconstitutional Statute 18, 19
Opinions of the Attorney General:
Vol. 10, p. 56 12
Vol. 31, pp. 213, 475 12
Vol. 35, p. 110 12
Vol. 36, p. 21 12
Vol. 38, p. — 12
Vol. 39, p. — 12

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 97

THE UNITED STATES OF AMERICA, APPELLANT

v.

BEN KAPP, BERT COX, TOM WOODS, ETC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court appears at R. 19–20.

JURISDICTION

The judgment of the District Court was entered April 6, 1937 (R. 20). The appeal to this Court was prayed for and allowed on May 5, 1937 (R. 21, 22). Probable jurisdiction was noted on October 11, 1937. The jurisdiction of this Court to review, on direct appeal, is conferred by the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. C., Title 18, Section 682).

QUESTION PRESENTED

Whether the District Court erred in sustaining the demurrer of the appellees to the second count of the indictment which charged them with conspiring to falsify material facts, in securing benefits under the provisions of the Agricultural Adjustment Act, for the purpose of defrauding the United States.

STATUTES INVOLVED

Section 37 of the Criminal Code, 35 Stat. 1096 (U. S. C., Title 18, Section 88) follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both.

Section 35 of the Criminal Code, 35 Stat. 1095, as amended by the Act of October 23, 1918, c. 194, 40 Stat. 1015, provides:

> Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government

of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, * * * shall be fined not more than $10,000 or imprisoned not more than ten years, or both. * * *

STATEMENT

On November 29, 1935, the appellees were indicted on two counts in the United States District Court for the Western District of Oklahoma (R. 1–15). The first count, as interpreted by the District Court in its opinion (R. 19), charged a conspiracy to violate the provisions of the Agricultural Adjustment Act. The first count is not here in-

volved, as no error is assigned to the order sustaining the demurrer as to it.

The second count, which is here in issue, alleges a conspiracy to violate Section 35 of the Criminal Code as amended, by making false claims, statements and representations, with intent to defraud the United States, whereby the defendants would obtain from the United States moneys in payment of benefits, allowed under the provisions of the Agricultural Adjustment Act, to which they were not entitled.

The second count first describes the hog-buying program of the Government. It is averred (R. 8) that the United States was at all times alleged in the indictment engaged in purchasing pigs from producers under the provisions of the Agricultural Adjustment Act of May 12, 1933, and under the rules and regulations made and promulgated by the Secretary of Agriculture to carry out the powers invested in him by that Act; and that, for the purpose of assuring that benefit payments provided for in the Act would reach the producers, the Secretary of Agriculture promulgated rules and regulations to the effect that hogs owned or consigned by traders and speculators were not eligible to benefit payments, and that the name and address of the owners of hogs declared eligible to benefit payments must be furnished to the processors receiving the hogs at the market. Further regulations are set out in the indictment, which

provided that pigs could be handled for individual farms by country buyers providing the farmer supplied with the pigs a letter or telegram authorizing the shipment.

These allegations are then made (R. 9):

> * * * it was the purpose and object of said conspiracy * * * that they [the defendants] should then and there falsely and fraudulently make certain false statements and misrepresentations, with intent to defraud the United States * * * whereby there would be shipped and transported to [a Chicago Commission Company] for sale to the Secretary of Agriculture and the United States of America * * * certain pigs which the defendants * * * had purchased and would purchase from farmers and producers of pigs * * * and said defendants would indicate and disclose, represent and state that the pigs so shipped would be the property of various producers other than the defendants, and which said pigs * * * would be sold by [the Commission Companies] to the United States of America at the premium price to be paid for said pigs under the rules and regulations promulgated by the Secretary of Agriculture hereinabove set forth, and which said pigs would, in truth and fact, be owned by * * * [the defendants].

The indictment alleges that it was part of the conspiracy directed toward a sale of the pigs to the Secretary of Agriculture that certain defendants

influential with Chicago commission firms would secure permits for the shipment of the pigs; that other defendants, pretending to be the original producers, would cause the Chicago commission merchants, acting as their agents in the sale, to lead representatives of the Secretary of Agriculture to believe that they were buying from the original producers (R. 10); and would cause to be presented to certain processing firms invoices for the pigs, as being the property of the original producers and sold by the commission merchants for the account of the Secretary of Agriculture; and would thereby cause the processors to present fictitious claims to the Field Auditor of the Agricultural Adjustment Administration (who was authorized by the Secretary of Agriculture to approve for payment such claims and vouchers), "knowing said vouchers and claims were and would be false, fictitious, and fraudulent" (R. 11).

The indictment further alleges eleven overt acts in pursuance of the conspiracy, setting out in detail that during September 1933 permits for shipment of the Government pigs were secured, and the defendants caused the agents of the commission merchants to present to processing firms invoices covering the pigs shipped, thereby causing the processors to present specified vouchers, containing items covering these invoices, to the Field Auditor of Agricultural Adjustment Administration (R. 11–15).

A demurrer, raising various objections, was interposed by defendants (R. 15, 17–18). On April 6, 1937, the demurrer was sustained as to each count, the court assigning as its reason the invalidity of the Agricultural Adjustment Act. As to the second count, it concluded that the misrepresentations as to who owned the hogs shipped "cease to be misrepresentations of material facts when the act itself falls". (R. 19–20.)

SPECIFICATION OF ERRORS TO BE URGED

1. The District Court erred in holding that the second count of the indictment stated no offense on the ground that the misrepresentations of facts alleged were not misrepresentations of facts within the meaning of Section 35 of the Criminal Code as amended, in as much as the Agricultural Adjustment Act is void.

2. The District Court erred in holding that Section 35 of the Criminal Code does not extend to and punish the offenses and acts of the defendants alleged in Count two of the indictment herein.

3. The District Court erred in sustaining the demurrer to the second count of the indictment.

SUMMARY OF ARGUMENT

I

Notwithstanding the unconstitutionality of the Agricultural Adjustment Act, appellees may be guilty of conspiracy to violate Section 35 of the

Criminal Code by obtaining benefit payments under that Act. Section 35 punishes anyone who shall wilfully falsify or conceal a material fact or make any false or fraudulent representations for the purpose and with the intent of cheating the United States. It was intended to protect the Government against all frauds, including frauds directed to activities of the Government undertaken pursuant to an unconstitutional statute. Because money should not be paid out of the Treasury to some favored class it does not follow that others may with impunity falsely represent that they are of that class, and so enrich themselves at public expense. Appellees conspired to cheat the Government by selling hogs at premium prices through misrepresentation as to the identity of the hogs sold. Although the Agricultural Adjustment Act is void, this Court will consider, as included in the facts of this case, the fact that this statute was passed, and that the Secretary of Agriculture promulgated regulations providing for purchase of hogs at premium prices only from the original producers. In view of these facts the representation made by appellees, that they were the producers of certain hogs to be sold to the Secretary of Agriculture, was clearly "material" within the meaning of Section 35 of the Criminal Code.

II

In any event appellees are estopped to attack the constitutionality of the Agricultural Adjust-

ment Act. They caused vouchers to be presented for payment to the agent appointed by the Secretary of Agriculture. Having invoked the Act, by action designed to secure benefits under the Act, they are estopped to assail its validity.

ARGUMENT

I

NOTWITHSTANDING THE UNCONSTITUTIONALITY OF THE AGRICULTURAL ADJUSTMENT ACT, APPELLEES MAY BE GUILTY OF CONSPIRACY TO VIOLATE SECTION 35 OF THE CRIMINAL CODE, BY FRAUDULENTLY OBTAINING BENEFIT PAYMENTS UNDER THAT ACT

The second count of the indictment charges a conspiracy (Section 37, Criminal Code, *supra*, p. 2) to violate Section 35 of the Criminal Code, *supra*, pp. 2–3. The latter section punishes one who "shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations" "for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States."

In this case the appellees conspired to cheat the United States by selling hogs to the Government at premium prices through misrepresentation as to the identity of the producers of the hogs sold. In

sustaining the demurrer interposed by appellees, the District Judge reasoned as follows (R. 20):

> The overt acts charged, which would be material in this count, are that hogs were shipped under the representation by the defendants that they were the hogs of various producers when in fact the hogs belonged to one or more of the defendants.
>
> There is no contention that the hogs were not shipped and that the bills, which were made to Armour and Company and other processors, were not correct bills, with the exception that the hogs did not originate from the sources represented by the defendants.
>
> This ceases to be a material fact, if the provisions of the Agricultural Adjustment Act are void. In other words, the representations, which are alleged to have been made, cease to be misrepresentations of material facts when the act itself falls.

1. The court's opinion disregards the legal significance of the fact that appellees were indicted on the second count, not for a conspiracy to violate the Agricultural Adjustment Act, but rather for a conspiracy to violate Section 35 of the Criminal Code, protecting the United States Government against frauds. The broad reach intended for Section 35 is apparent from a consideration of the amendment by the Act of October 23, 1918, c. 194, 40 Stat. 1015. The statute, originally confined to the punishment of those presenting fraudulent claims based upon

the Government's own liability, *United States* v. *Cohn*, 270 U. S. 339, 345–346, was extended to "include others * * * who cause pecuniary or property loss to the government by willfully concealing by some trick, etc., a material fact." *Capone* v. *United States*, 51 F. (2d) 609, 615 (C. C. A. 7th). In view of the ruling of *United States* v. *Bowman*, 260 U. S. 94, 102, that Section 35 must not be given an artificially strict construction but must be "fairly construed according to the legislative intent," it is clear that the section was intended to cover *all* situations in which the Government might be cheated.

In reaching a result contrary to other rulings announced on an identical fact situation, *United States* v. *MacDonald*, 10 F. Supp. 948 (W. D. Mo.); *United States* v. *Soeder*, 10 F. Supp. 944 (W. D. Mo.), the court below apparently proceeded on the assumption that the Government could not be defrauded when operating under an invalid law.[1]

[1] The assigned errors, through a parenthetical citation, imply that the hog purchases were undertaken under Section 8 of the Agricultural Adjustment Act, c. 25, 48 Stat. 31 (R. 22). This section was declared invalid in *United States* v. *Butler*, 297 U. S. 1. We are informed that in fact the purchases were with funds made available for activities under Section 12 (b) of the original Act, the validity of which was not considered in the *Butler* case. In conformity to the settled policy of this Court not unnecessarily to decide constitutional questions, *Burton* v. *United States*, 196 U. S. 283, 295; *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 355, we assume for the purpose of this argument that Section 12 (b) was inseparably linked to Section 8, and that the payments were accordingly made under an unconstitutional statute.

But the money which the respondents sought to obtain was money of the United States. Whether or not the statute and regulations under which the respondents made claim for payment were constitutional, their misrepresentations were made "with the intent of cheating * * * the Government." As such they are condemned by Section 35, irrespective of the constitutionality of the Act under which payments were made.

2. The court below apparently proceeded upon the hypothesis that the Government officials should have known that the statute was unconstitutional and that respondents' misrepresentations thus could not be taken to be material since payment should not be made in any event. Such a hypothesis is unrealistic. It ignores a vital principle of practical constitutional government, that a law is presumed to be constitutional until it is judicially declared invalid, and that it is the duty of Government officials to enforce a statute duly enacted by Congress until it is held to be invalid.[2]

---

[2] 31 Op. A. G. 475, 476 (Attorney General Palmer); 35 Op. A. G. 110, 114–115 (Attorney General Stone, referring to a letter written by a predecessor); 38 Op. A. G. —— (Opinion of August 16, 1935; Attorney General Cummings); 39 Op. A. G. —— (Opinion of March 26, 1937; Attorney General Cummings); see also 36 Op. A. G. 21, 25 (Attorney General Mitchell; cf. 10 Op. A. G. 56, 61 (Attorney General Bates); 31 Op. A. G. 213, 215 (Acting Attorney General Davis). It is settled doctrine in this Court that a public official has no standing, under the due process clause, to attack the constitutionality of a statute which he is under a duty to enforce. See e. g. *Smith* v. *Indiana*, 191 U. S. 138, 148; *Colum-*

Certainly the respondents knew that the Government officials were acting on the assumption that the statute was constitutional, else they would not have presented the false claims. And since the Government officials were in fact making the payments, the misrepresentations were necessarily material and served to defraud the Government, whatever the ultimate decision as to the constitutional authority to make the payments.

Any other doctrine would have most dangerous consequences in the encouragement of fraud and chicanery in dealing with the Government. Further; the logic would seem to carry over to outright theft of Government property used in a program later declared unconstitutional, since the United States might be said to be without authority to purchase or hold the property for such a purpose, and thus to reduce the central government to a status at least reminiscent of that of the felon declared outlaw at ancient common law.

3. The uniform course of decisions in other courts makes it plain that there is nothing in the logic of constitutional government which requires that payments made pursuant to an unconstitu-

---

Bus & Greenville Ry. v. *Miller*, 283 U. S. 96, 99. In *Smith* v. *Indiana*, *supra*, 148, the Court said in *dictum:*

"* * * there are many authorities to the effect that a ministerial officer, charged by law with the duty of enforcing a certain statute, cannot refuse to perform his plain duty thereunder upon the ground that in his opinion it is repugnant to the Constitution."

tional program be declared fair game for knaves and cheats.

Trenchant reference to the realities of the situation may be found in *United States* v. *MacDonald, supra* (10 F. Supp. 948):

> Let it be assumed arguendo that in the Agricultural Adjustment Act there was an unconstitutional delegation of legislative power. Let it be assumed arguendo that the regulations made by the Secretary of Agriculture and referred to in the indictment were not authorized. Still the government did devise a pig buying program. Certainly any who conspired together to sell pigs to the government under that program, falsely representing that they were entitled to the benefit of its provisions and so to obtain money from the public treasury, have committed a crime. *Because money should not be paid out of the treasury to some favored class it does not follow that others who falsely represent that they are of that class, and so enrich themselves at public expense, should go unpunished.* [Italics added.]

Contrary to the approach of and the result reached by the court below is the case of *Madden* v. *United States,* 80 F. (2d) 672 (C. C. A. 1st). An indictment drawn under Section 28 of the Criminal Code, U. S. C., Title 18, Sec. 72, which prohibits forgeries made "for the purpose of defrauding the United States", charged the forgery of a name to an assignments and identification card

used by the Civil Works Administration in the selection of individuals employed on a project to which Federal funds were advanced. The defense was interposed that the National Industrial Recovery Act, under which the money was appropriated, was unconstitutional. The court said (p. 674):

> There seems to be some diversity of opinion as to the constitutionality of this law * * *; but this is not a question which we must decide, for if we were to assume that the act appropriating the money is unconstitutional, such assumption does not furnish justification for embezzlement of the funds in question, neither would it furnish justification to the defendant for diverting by means of forged instruments such funds from the channels to which they had been allocated.

In the recent opinion of *United States* v. *Seelig and Mesch Construction and Equipment Corp.* (S. D. N. Y., December 8, 1936), set out in the Appendix, *infra*, p. 31, the indictment, charging a violation of Section 35 of the Criminal Code, alleged that the defendants had submitted, in connection with work done under the Emergency Relief Appropriation Act of 1935, vouchers falsely stating the rates at which certain employees were paid. In refusing to countenance, as a possible defense, the invalidity of the Emergency Relief Appropriation Act, the court stated:

> I am in accord with the view expressed by the court in *Madden* v. *United States*. The

> result urged by the defendants would lead inevitably to gross frauds upon the Government. *Pressed to its logical conclusion, the defendants' thesis is that* whenever a specific appropriation by Congress has been made *under an unconstitutional statute, the fund appropriated becomes fair game for contractors dealing with the government, and is not within the protection of federal statutes designed for its protection.* Even if the fund here involved were improperly appropriated, the money, so long as it is within the control of the Treasury Department, remains the property of the United States and its expenditure, even for an illegal purpose, must necessarily be in accordance with pertinent rules and regulations, and the matter of their application to a governmental function under the jurisdiction of the department authorized to execute the legislation.

These cases exemplify the uniform course of decision on the problem. Other criminal cases involving conspiracy or fraud, and rejecting defenses grounded on the alleged invalidity of the Government's activities, include *Langer* v. *United States*, 76 F. (2d) 817, 824–825 (C. C. A. 8th) (conspiracy corruptly to administer Federal Emergency Relief Act and Act setting up the Reconstruction Finance Corporation); *United States* v. *Harding*, 81 F. (2d) 563 (App. D. C.) (conspiracy to deprive Government of money appropriated to Public Works Administration under the National Industrial Re-

covery Act); *United States* v. *Soeder,* 10 F. Supp. 944, 947 (W. D. Mo.) (conspiracy to defraud Government by violating provisions of Agricultural Adjustment Act); *United States* v. *Schor,* 13 F. Supp. 399, 401 (E. D. N. Y.) (presenting false claims in connection with project built in part with funds appropriated under National Recovery Act); cf. *Cagle* v. *United States,* 3 F. (2d) 746 (C. C. A. 6th) (conspiracy to defraud Government of title and possession to an automobile; held immaterial whether automobile had been obtained by legal or illegal seizure).

4. The *Langer* and *Harding* cases, *supra,* utilize a slightly different approach to the problem. As stated in *Harding* v. *United States,* 81 F. (2d) at 568:

> We answer this point as did the Circuit Court of Appeals in the Eighth Circuit, *Langer* v. *United States,* 76 F. (2d) 817, 824, that the gist of the offense charged is conspiracy, and the indictment being properly drawn under the conspiracy statute, the attack on the National Industrial Recovery Act is in the nautre of a collateral attack; and the indictment is good as a conspiracy indictment even though the National Recovery Act may be unconstitutional.

It is submitted that, in the present context, this doctrine of "collateral attack" constitutes merely a formulistic expression of the thesis that the substantive crime, the fraud upon the Government or the conspiracy to defraud, is punishable whether

or not the Government's activities were undertaken pursuant to a valid law. The concept is doubtless borrowed from the substantial body of authority to the effect that private corporations and municipal corporations created under, and public officers appointed under, an unconstitutional statute, are not wholly to be ignored, but constitute *de facto* corporations or *de facto* officers, whose title or lawful authority may not be attacked collaterally,[3] but may

---

[3] See, e. g., *Smith* v. *Sheeley*, 12 Wall. 358 (*de facto* bank, organized under act of territorial legislature which was without any force or effect because not approved or confirmed by Congress). Many cases are collected in Field, The Effect of an Unconstitutional Statute, Introduction, chapters II, III, IV. It is not suggested that the cases are all uniform, and it is not denied that several cases attribute no legal effect whatever to an invalid enactment. See, e. g., Field, *passim*, and see pp. 43, 102. As typical of the cases giving some effect to a statute already declared unconstitutional, or without determination of its validity *vel non*, see, e. g., *City of Topeka* v. *Dwyer*, 70 Kan. 244 (person indicted for violation of ordinance may not attack statute authorizing addition of territory around his home to the municipal limits); *Smith* v. *Lynch*, 29 Oh. St. 261 (taxpayer may not enjoin collection of tax because board collecting the tax was established by an invalid ordinance); *Curtin* v. *Barton*, 139 N. Y. 505 (party to civil suit may not appeal on the ground that the trial judge was appointed to office under an invalid statute); *Ex parte Strang*, 21 Oh. St. 610 (same result in criminal case). It is not intended to suggest that "de facto" action may always be taken under an invalid law. Thus a defendant in a criminal case may not attack the validity of the statute governing the selection of the trial judge, but he may attack the statute creating the court or the office of the judge. Field, pp. 101 *et seq.* Such refinements do not obscure the fact that, at least in some situations, some legal cognizance will be taken of an unconstitutional statute.

be brought into question directly by appropriate officials, e. g., through a *quo warranto* action by the attorney general of the State. "Collateral attack" does not have precisely the same connotations as applied to an attack on a statute which does not also involve an attack on an official or corporate authority (which might more appropriately be attacked in an authoritative and direct proceeding). Yet it is apparent that similar considerations of policy may be pertinent to both types of cases.

Thus, analogous to the case at bar is *State* v. *Gardner,* 54 Oh. St. 24. The defendant was indicted for offering a bribe to a city commissioner. The defense was that the statute creating the city of which the commissioner was alleged to be an officer was unconstitutional, and there being no legal organization of the city or its government there could be no officer of the city to whom a bribe could be offered. The court held that the existence of the city or its government could not be attacked in such a case.[4] See 54 Oh. St. at 31:

> We think that principle of public policy, declared by the English courts three centuries ago, which gave validity to the official acts of persons who intruded themselves into an office to which they had not been

[4] But cf. *Kirby* v. *State,* 57 N. J. L. 320 (incumbent of office created by unconstitutional statute cannot be guilty of extortion), whose precedent value in its own jurisdiction is discussed and doubted, see Field, The Effect of an Unconstitutional Statute, p. 107.

legally appointed, is as applicable to the conditions now presented as they were to the conditions that then confronted the English judiciary. We are not required to find a name by which officers are to be known, who have acted under a statute that has subsequently been declared unconstitutional, though we think such officers might aptly be called "*de facto* officers." * * * Courts, in the practical administration of justice should regard the substance of things and deal with conditions as they actually exist. Here are grave and important official acts actually performed by virtue of an office, created under the provisions of a statute regularly enacted by that branch of the government to which the power to make law has been delegated by the constitution; there is a clearly established legal presumption of its validity. The public in its organized capacity as well as private citizens has acquiesced in and submitted to their authority. Such circumstances, the majority of the court are of opinion, are sufficient to give such color to their title as to make them *de facto* officers; but whether they fall within the previously existing definition of such officers or not, their official acts thus performed fall within the protection of that principle of public policy which defends them against collateral attack, and that, therefore, the question of the constitutionality of the statute in question was not before the court of common pleas.

5. The fundamental error of the formalistic opinion below lies in the breadth of its major premise, that the Agricultural Adjustment Act was "void ab initio" (R. 19).[5] Presumably the trial judge was invoking the well-known expression frequently excerpted from *Norton* v. *Shelby County,* 118 U. S. 425, 442:

> An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; *it is, in legal contemplation, as inoperative as if it had never been passed.* [Italics added.]

If the premise be accepted, the syllogism acquires a superficial persuasiveness. If no Agricultural Adjustment Act had ever been passed, perhaps it would not be "material" to any Government official whether the hogs he purchased were produced by the vendor or not.

But the statement that an unconstitutional statute must be viewed as if it had never been passed is not true in all contexts and for all purposes. It is not necessary here to inquire into the legal rights and duties which may arise by virtue of the enforcement and application of a statute later declared unconstitutional. It is certainly true that this Court will not shut its eyes entirely to the fact that a statute was passed and enforced, and that individuals and officials took action and made plans

[5] Although this expression was used only in the discussion of the first count of the indictment, it is apparent that this theory underlies the entire opinion.

with reference to the law on the books. In other words, the statute will be regarded, in an appropriate instance, as one of the *facts* in the case.

Authority for this view is to be found in *United States* v. *Realty Company,* 163 U. S. 427. That case involved two actions brought to obtain moneys by reason of Congressional legislation in regard to sugar bounties. The Tariff Act of 1890 provided for a bounty to be paid to producers of sugar produced in this country. This statute was repealed in 1894, and in 1895 Congress provided that a bounty should be paid to those producers and manufacturers who had complied with the 1890 law and had not yet been paid. The disbursing official declined to pay the bounty on the ground that the 1890 Act was unconstitutional, and that therefore there was no debt for which Congress could validly make an appropriation (by means of the 1895 statute) under its power to lay and collect taxes "to pay the debts" of the United States. This Court refused to decide whether or not the 1890 Act was void, and held that in any case the producers had claims of an equitable or moral nature which could validly be recognized by Congress. See pp. 438, 439:

> Being unconstitutional, there never was a moment, it is stated, when there was any valid act, and, therefore, no equities can arise in their favor because of any acts done by them upon the faith of the act, which they were bound to know was wholly void.

This reasoning does not exactly fit the case. It is not a question whether any strictly legal rights can arise out of an unconstitutional act. It is a question whether equitable considerations can attach to a claim which, among other grounds, is based upon an act that was supposed by all the officers of the government to be valid and which was repealed only when the whole taxing act of 1890 was subjected to a careful and comprehensive revision. There are occasions when the presumption that every man knows the law must be enforced for the safety of society itself. * * * But in such a case as this, *knowledge of the invalidity of the law in advance of any authoritative declaration to that effect will not be imputed to those who are acting under its provisions,* and receiving the benefits provided by its terms. These parties cannot be held bound, upon the question of equitable or moral consideration, to know what no one else actually knew, and what no one could know prior to the determination, by some judicial tribunal, that the law was unconstitutional. Although it should finally turn out that the law is invalid, and is so pronounced, yet during all the time of its operation, as has been stated, all the officers of the government united in treating it as a valid act. No court had determined to the contrary. It was a question at least admitting of argument. * * *

We are of the opinion that the parties, situated as were the plaintiffs in these ac-

> tions, acquired claims upon the government of an equitable, normal or honorary nature. * * * They are asserting that *by reason of the occurrences which took place before the appropriation, among which was the passage of the act of 1890,* they were so placed before Congress, as to authorize that body to recognize the equities of the situation, and to pay their claims which, while they were not of a legal character, were nevertheless of so meritorious and equitable a nature as to authorize the nation through its Congress to appropriate money to pay them. [Italics added.]

Unconstitutional though the 1890 law may have been, it was real enough to be considered as an "occurrence," or a fact in the case, supporting the conclusion that the sugar producers who had taken action in reliance on the statute, had an "equitable" or "moral" claim against the Government.

Similarly here, when the Agricultural Adjustment Act is viewed as one of the facts in the case, lending meaning to the actions and plans of the appellees, then their criminal responsibility, based upon the materiality of their representations, becomes obvious.

Within the meaning of the doctrines governing actions in fraud and deceit, a representation is "material" if it offers a motive sufficient to influence the conduct of a person of average intelligence, Bigelow, Fraud (1888) p. 497; *Hall* v. *Johnson,* 41 Mich. 286, 289, or if the representor is aware

that this statement, "though it would be utterly inoperative on the mind of any other person, will make all the difference in the world to the particular representee to whom he addresses it," Spencer Bower, Actionable Misrepresentation (1911) Sec. 128. Here the Agricultural Adjustment Act was in existence and had not yet been declared invalid. Appellees had knowledge of the regulations they desired to circumvent, which made it clear that the Field Auditor, whose duty it was to enforce the Act and approve the vouchers for payment, regardless of his opinion as to its constitutionality, would be influenced by the representation that appellees were the producers of the hogs sold. It seems obvious that their misrepresentation was a "material" one.

II

APPELLEES ARE ESTOPPED TO ATTACK THE CONSTITUTIONALITY OF THE AGRICULTURAL ADJUSTMENT ACT

Even if it be assumed that the success of a prosecution for a conspiracy to violate Section 35 of the Criminal Code is dependent upon the constitutionality of the Agricultural Adjustment Act, the appellees are estopped to assail the constitutionality of that Act.

It is well settled that one who has availed himself of the benefits of a statute is estopped to question its constitutionality. *Daniels* v. *Tearney*, 102 U. S. 415, 421; *St. Louis Co.* v. *Prendergast Co.*, 260 U. S.

469, 472–473. For purposes of this argument on demurrer it does not appear that the appellees received payments under the Agricultural Adjustment Act,[6] but the doctrine of estoppel applies as well to one who has not actually received benefits under a statute, but has taken action under the statute in quest of such benefits. Thus, apart from the rule that one may not both rely upon and assail an enactment in the same proceeding, *Hurley* v. *Commission of Fisheries*, 257 U. S. 223, 225, the constitutionality of a statute may not be attacked by one who has previously invoked the statute by taking steps or instituting proceedings in accordance with its provisions. *Great Falls Mfg. Co.* v. *Attorney General*, 124 U. S. 581, 598–600; *Wall* v. *Parrot Silver & Copper Co.*, 244 U. S. 407, 411–412; *United Gas Co.* v. *Railroad Comm.*, 278 U. S. 300, 307–308; cf. *Booth Fisheries* v. *Industrial Comm.*, 271 U. S. 208.

In both the *Great Falls Mfg. Co.* and *Wall* cases a party who had instituted a proceeding prescribed by statute for the determination of damages suffered from the loss of property rights was held unable to maintain a separate suit attacking the constitutional sufficiency of the statutory proce-

---

[6] The second count of the indictment does not disclose that appellees ever received a payment of benefits under the Agricultural Adjustment Act, [illegible] (R. 11–15). The first count, which avers that pigs were sold to the agents of the Secretary of Agriculture at premium prices (R. 5), is not before the Court on this appeal.

dure to provide adequate remuneration, though the proceedings had not yet culminated in an award, and no benefits had been received. In the *United Gas Co.* case, because a gas company had petitioned a state commission to establish higher rates or permit withdrawal from service, it was held unable, in a suit to set aside the commission's order denying it relief, to assail the statute creating the commission, or the statute prohibiting any public service company which had continued its service after the expiration of its franchise partially to withdraw from such service without permission of the commission.

It is true that in *Buck* v. *Kuykendall*, 267 U. S. 307, the Court directed that the enforcement of a Washington statute, making a certificate of convenience and necessity a prerequisite to the use of the highways by a common carrier operating purely in interstate commerce, be enjoined at the instance of one who had applied, in vain, for such a certificate. The Court stated (pp. 316–317) that the doctrine of estoppel was not applicable, though the carrier had invoked the exercise of the power now assailed, because the carrier had neither received any benefit, nor was it relying on the statute and attacking it in the same proceeding. The case may be open to the distinction that the statute, delimiting the freedom to engage in the transportation business, was wholly burdensome as to carriers, and could not possibly confer any benefits. But

the approach of the case seems to be at variance with the cases just discussed.[7]

On principle as well as authority it seems that a party should not be able to assume inconsistent positions,[8] first to rely on a statute and later to assail it, even though he has failed to secure the benefits which he sought under the statute. It is believed that the correct doctrine is that stated in the more recent decision of *United Gas Co.* v. *Railroad Commission,* 278 U. S. 300, 307–308:

> It is the rule of this Court, consistently applied, that one who has invoked action by state courts or authorities under state statutes may not later, when dissatisfied with the result, assail their action on the theory that the statutes under which the action was taken offend against the Constitution of the United States. * * *

---

[7] In *Great Falls Mfg. Co.* v. *Attorney General,* 124 U. S. 581, the Court emphasized the inconsistency of the corporation's position: it had previously acquiesced in the taking of the property, and the procedure before the Court of Claims; it could not now bring a suit proceeding on the ground that there had been no lawful taking (pp. 598, 600). The Court stated that the corporation should have stood upon its constitutional rights in the first place, if it desired to urge them (p. 600). See *infra,* footnote 6. In *Wall* v. *Parrot Silver & Copper Co.,* 244 U. S. 407, the Court stated (p. 412): "They cannot claim the benefit of statutes and *afterwards* successfully assert their invalidity." [Italics added.]

[8] The power to claim a constitutional right may be barred "by deliberate election or by conduct inconsistent with the assertion of such a right." *Pierce Oil Co.* v. *Phoenix Refining Co.,* 259 U. S. 125, 128–129.

The indictment sets out that appellees conspired to obtain benefits under the Agricultural Adjustment Act, and that they caused to be presented to the Field Auditor appointed by the Secretary of Agriculture vouchers for approval and payment by the United States. Having thus invoked the Act, by action designed to secure benefits under the Act, they are estopped to attack its validity.

None of the factors in the instant case precludes the application of the doctrine of estoppel. It applies to Federal as well as State statutes. *Great Falls Mfg. Co.* v. *Attorney General,* 124 U. S. 581; *American Bond & Mortgage Co.* v. *United States,* 52 F. (2d) 318, 321 (C. C. A. 7th); see *Hirsh* v. *Block,* 267 Fed. 614, 618 (App. D. C.), reversed on another ground, 256 U. S. 135; cf. *Humbird* v. *Avery,* 195 U. S. 480. It applies notwithstanding the fact that the Agricultural Adjustment Act is concededly unconstitutional in several aspects, *United States* v. *Butler,* 297 U. S. 1. In *Daniels* v. *Tearney,* 102 U. S. 415, the Court declared a statute invalid (pp. 418–419) and yet held that there was an estoppel to aver its unconstitutionality (pp. 421–422). It applies notwithstanding the fact that a criminal prosecution is involved, where the defendant has accepted the benefits of or invoked the statute.[9] *Kluczek* v. *State,* 115 N. J. L. 105, 111;

[9] In addition may be cited several criminal cases precluding a defendant from relying on and assailing the statute in the same proceeding. *Hunt* v. *State,* 186 Ind. 644; *State* v. *Collins,* 225 Mo. 633; *Ayers* v. *Newark,* 49 N. J. L. 170; *State* v. *Board of Police Com'rs,* 56 N. J. L. 258.

Ingles v. *People,* 90 Colo. 51, 56–57; *Jannett* v. *Windham,* 109 Fla. 129, 130;[10] *State* v. *Stone,* 46 La. Ann. 147, 150.[11]

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the District Court should be reversed and the cause remanded with instructions to overrule the demurrer.

STANLEY REED,
Solicitor General.

BRIEN MCMAHON,
Assistant Attorney General.

W. W. BARRON,
Special Assistant to the Attorney General.

JOHN M. SULLIVAN,
Attorney.

HAROLD LEVENTHAL,
Special Attorney.

NOVEMBER 1937.

---

[10] On rehearing, as an alternative ground of decision, the state court examined the statute and held it consonant with the Federal Constitution, and on this ground the judgment was affirmed, 290 U. S. 602.

[11] The court held that a defendant who had furnished samples of milk without objection could not attack the provision of a milk ordinance requiring dairymen to furnish free samples or attack the regularity of the execution of the ordinance, but it did permit him to attack the separate provision punishing the sale of adulterated milk.

APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

No. C 99–6

UNITED STATES OF AMERICA, PLAINTIFF

v.

M. C. SEELIG AND MESCH CONSTRUCTION AND EQUIPMENT CORP., DEFENDANTS

OPINION

KNOX, D. J.

This is a demurrer to an indictment in nine counts, each charging violation of Criminal Code, Section 35, 18 U. S. C. A., Section 80. The defendants have been indicted for submitting to the Treasury Department, Procurement Division, false vouchers for services rendered, viz, renting of equipment and furnishing personnel to the Treasury Department, Procurement Division, for work under the Emergency Relief Appropriation Act of 1935. The Treasury Department's invitations to bid required specifications stating the wages to be paid personnel. These specifications were part of the contract. In submitting their bids, the defendant proposed to pay their engineers $1.50 per hour and their drill runners $1.10 per hour, plus compensation insurance. The Treasury Department accepted defendants' bids for services in connection with the construction of the foundation of a

library at City College, and on the removal of street car tracks on Madison Avenue and on Central Park West, New York City. Thereafter, defendants submitted bills, receipts, vouchers, etc., to the Treasury Department in which certification was made that defendants had paid the two classes of personnel at the rates agreed upon in the contracts. These claims presented have been partially paid by the Treasury Department. The government charges that the papers mentioned in the indictments and submitted to the Department, as charged therein, were false, and known to be false in that defendants had paid their personnel substantially less than was represented to the Treasury Department.

The statute under which this prosecution is brought reads as follows:

> Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and wilfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any

> fraudulent or fictitious statement or entry, in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder shall be fined not more than $10,000., or imprisoned not more than ten years, or both. (As amended June 18, 1934, c. 587, 48 Stat. 996.)

The principal ground of the defendants' demurrer is that Criminal Code, Section 35, 18 U. S. C. A., Section 80, as construed with sections 1 and 7 of The Emergency Relief Appropriation Act of 1935, is inapplicable to defendants' transactions with the Treasury Department; if, however, the acts are applicable, they are unconstitutional because they are beyond the powers delegated to Congress by the Constitution or because they purport to delegate legislative power to the President of the United States. The defendants also contend that the indictment fails to state facts sufficient to constitute a crime. The defendants stress the phrase "matter within the jurisdiction", contending that the statute under which the contracts were made, viz., The Emergency Relief Appropriation Act of 1935, is invalid, and therefore the matter cannot be "within the jurisdiction" of the Treasury Department.

In *Madden* v. *United States,* 80 Fed. (2d) 672, the defendant, appealing from a conviction for forging certain assignment cards used by the Civil Works Administration, contended that Title II of The National Industrial Recovery Act was unconstitutional. The court, in affirming the conviction, said:

> Counsel for the appellant stresses the point in argument that the provisions of the

> National Industrial Recovery Act are unconstitutional and that Congress has no constitutional authority under the public welfare clause to set up a bureau or agency for the expenditure of federal funds for purely state or municipal projects such as to pay employees for cataloguing books in the Boston Public Library.
>
> There seems to be some diversity of opinion as to the constitutionality of this law (citing cases); but this is not a question which we must decide, for if we were to assume that the act appropriating the money is unconstitutional, such assumption does not furnish jurisdiction [*sic*] for embezzlement of the funds in question, neither would it furnish justification to the defendant for diverting by means of forged instruments such funds from the channels to which they had been allocated.

The Supreme Court denied certiorari, 56 Supreme Court 502.

I am in accord with the view expressed by the court in *Madden* v. *United States*. The result urged by the defendants would lead inevitably to gross frauds upon the Government. Pressed to its logical conclusion, the defendants' thesis is that whenever a specific appropriation by Congress has been made under an unconstitutional statute, the fund appropriated becomes fair game for contractors dealing with the government, and is not within the protection of federal statutes designed for its protection. Even if the fund here involved were improperly appropriated, the money, so long as it is within the control of the Treasury Department, remains the property of the United States and its expenditure, even for an illegal purpose, must nec-

essarily be in accordance with pertinent rules and regulations, and the matter of their application to a governmental function under the jurisdiction of the department authorized to execute the legislation.

In *United States* v. *Schor,* 13 Fed. supp. 399, a case very similar to the instant prosecution, the court said:

> * * * the exercise of an administrative function, i. e., jurisdiction, on the part of an agency of the United States was recognized as a necessary consequence of entering into and carrying out the contract, into which these defendants entered.
>
> If the foregoing reflects a correct understanding of the necessary incidents of the contract which gave rise to the defendants' claims for payments, it follows that they intended to and did submit themselves to the exercise of jurisdiction by an agency of the United States, when they filed the certificates, vouchers and bill which they knew to be false, and that this court had jurisdiction of the offense charged.

It thus becomes unnecessary to pass upon the constitutional issues proposed by the defendant.

The demurrer is overruled.

DECEMBER 8, 1936.

U. S. GOVERNMENT PRINTING OFFICE: 1937